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BEFORE THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 235

CHICAGO & SOUTHERN AIR LINES, INC., *Petitioner*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*,
RESORT AIRLINES, INC., *Intervener*.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROGER J. WHITEFORD,
HUBERT A. SCHNEIDER,
PHILIP S. PEYSER,
815 15th Street, N. W.,
Washington 5, D. C.,
Attorneys for the Petitioner.

WHITEFORD, HART, CARMODY & WILSON,
815 15th Street, N. W.,
Washington 5, D. C.

R. S. MAURER,
General Counsel,

L. E. BLACK, JR.,
Asst. General Counsel,

CHICAGO & SOUTHERN AIR LINES, INC.,
Municipal Airport, Memphis, Tennessee,
Of Counsel.

October 23, 1950.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
JURISDICTION	2
REASONS FOR PETITION FOR REHEARING	2
CONCLUSION	5

TABLE OF CASES.

Chicago & Southern Air Lines v. Waterman Steamship Co., 333 U. S. 103 (1948) 2, 3, 4

Clark v. Manufacturers Trust Co., 337 U. S. 953, 338 U. S. 241 2

Trans-World Airlines v. Civil Aeronautics Board, et al., 184 F. 2d (Adv.) 66 (C. A. 2d, 1950) 2, 3, 4

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To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that this Court grant rehearing of its order of October 9, 1950, denying the petition for a writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit in the above-entitled case as prayed for in the petition filed August 4, 1950, herein.

JURISDICTION.

The petition for certiorari was filed on August 4, 1950, and denied on October 9, 1950. This petition for rehearing is filed within fifteen days from October 9, 1950, in accordance with Rule 33 of this Court. It is based upon intervening circumstances of substantial or controlling effect since the filing of the petition for a writ of certiorari. See *Clark* v. *Manufacturers Trust Co.*, 337 U. S. 953, 338 U. S. 241.

REASONS FOR PETITION FOR REHEARING.

Since the filing of the petition for a writ of certiorari herein the United States Court of Appeals for the Second Circuit has rendered a decision which is in conflict with the decision of the Court of Appeals for the District of Columbia Circuit in the instant case. *Trans World Airlines, Inc.* v. *Civil Aeronautics Board, et al.*, 184 F. 2d (Adv.) 66 (CA 2d, 1950). Both the instant case and the *TWA Case* involved petitions for judicial review of orders of the Civil Aeronautics Board approved by the President pursuant to Section 801 of the Civil Aeronautics Act. Both cases presented questions as to the applicability of the decision of this Court in *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103 (1948) (R. 72). In both cases it was alleged that the Board and the President had exceeded their legal powers in making the orders complained of.

In the instant case the Court of Appeals for the District of Columbia did not pass upon the merits of petitioner's contentions with respect to invalid exercise of Board and Presidential power and in a per curiam order dismissed the petition for review, citing the *Waterman Case* as precluding judicial review. On the other hand in the *TWA Case* the Court of Appeals for the Second Circuit considered the contentions made by the petitioners with respect to invalid exercise of Board and Presidential power, determined that those contentions were without merit, and concluded that the order complained of was valid. Only then did the Sec-

ond Circuit dismiss the petitions for review in accordance with this Court's decision in the *Waterman Case.*

The decision of the Court of Appeals for the District of Columbia Circuit and that of the Court of Appeals for the Second Circuit in substantially similar circumstances, thus have created a conflict between the circuits in the interpretation and application of this Court's decision in the *Waterman Case,* which conflict did not exist at the time the Petition for Certiorari was filed herein.

In one of the opening sentences of his majority opinion in the *Waterman Case* Mr. Justice Jackson stated:

> "*By proceedings not challenged as to regularity,* the Board, with express approval of the President, issued an order which denied Waterman Steamship Corporation a certificate of public convenience and necessity." 333 U. S. 105 (Italics supplied).

This language clearly implied that "challenges as to regularity" were subject to judicial review and that the immunity granted by the *Waterman Case* to joint President-Board action did not extend to a case where such joint action was invalidly exercised or where the Board and the President sought to exercise authority beyond that granted by the Civil Aeronautics Act. The Court of Appeals for the Second Circuit in the *TWA Case* adopted this interpretation of the *Waterman Case.* It first disposed of the "challenges as to regularity" before applying the *Waterman Case* and denying further judicial review.

> "For the foregoing reasons we think that the President and the Board acted within their legal powers in making the order of July 10. *If so,* the Court is without jurisdiction to review that order and the petitions for review will have to be dismissed when brought on for hearing." *Trans World Airlines, Inc.* v. *Civil Aeronautics Board, et al., supra.* (Italics supplied)

The opinion clearly states that *if the order is valid,* it is not subject to review. The converse must therefore be true,

i.e. *if the order is invalid, it is subject to review.* In either event, before the rule of the *Waterman Case* can be applied to deny judicial review, the validity of the order complained of must first be determined.

Petitioner's "challenges as to regularity", as set forth in its petition for review below, have yet to be reviewed by any court. The Court of Appeals for the District of Columbia Circuit construed the *Waterman Case* as precluding judicial review of *any* order resulting from joint President-Board action, did not dispose of the merits of the petitioner's "challenges as to regularity" and merely issued a per curiam order dismissing the petition for review upon the authority of the *Waterman Case.* The Court of Appeals for the Second Circuit construed and applied the *Waterman Case* as requiring first a determination of the validity of the "challenges as to regularity" before judicial review could be denied. To that extent the decisions of the two circuits are in direct conflict. Short of a decision by this Court no one can say with certainty whether "challenges as to regularity" of joint President-Board action in the field of international air transportation are judicially reviewable. To resolve this conflict a writ of certiorari should issue herein.

It will be noted that the Court of Appeals for the Second Circuit rendered its opinion in the *TWA Case* at an early stage of the proceedings in order to "accelerate the parties access to the Supreme Court if they are disposed to seek it." This indicates a recognition by that Court of the importance of the question presented. Counsel is advised that a petition for writ of certiorari will be filed by one of the parties in the *TWA Case* in due course.

The conflict between the circuits is one of substance and places squarely in issue the question whether the detailed standards and provisions inserted by Congress in the Civil Aeronautics Act are to be followed or may be ignored in cases requiring Presidential approval. The conflict is not one of mere technique. The decision in the *TWA Case,* by

reviewing the validity of the order complained of, provides assurance that the order issued by the Board and approved by the President is a valid one and satisfies the procedural and substantive requirements imposed by Congress in the Act. The decision of the Court below provides no such assurance. On the contrary, by failing to review the validity of the order complained of it cloaks with immunity all orders approved by the President even where the express requirements of the Act have been ignored or violated.

CONCLUSION.

For the foregoing reasons, petitioner respectfully urges that rehearing be granted; and that upon such rehearing a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

ROGER J. WHITEFORD,
HUBERT A. SCHNEIDER,
PHILIP S. PEYSER,
Counsel for Petitioner.

Certificate of Counsel.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

ROGER J. WHITEFORD,
HUBERT A. SCHNEIDER,
PHILIP S. PEYSER,
Counsel for Petitioner.